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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 578

THOMAS PAPER STOCK COMPANY AND ALVIN E. SANDROFF,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

REPLY BRIEF FOR PETITIONERS.

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"To state the question often is to decide it. And it may do this by failure to reveal what fully is at stake."[1]

The question presented in this proceeding is not correctly stated in the opinion of the court below. And a rather obvious misstatement of the question is made in the Government's brief here.

The Court Below Begs the Question.

In its statement (R. 45), the court below simply begs the question:

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[1] Mr. Justice Rutledge, dissenting in *Yakus* v. *United States*, 321 U. S. 414, p. 482.

> The narrow question which this case presents is whether a previously valid price regulation *which, because there was no practicable alternative for securing effective price control, used a specification or standard not previously used or required*, was rendered invalid by subsection (j)(3) of Section 2 from the time of the enactment of that subsection until the time when the Administrator determined and recorded the fact that no such alternative to the use of the specification or standard existed. [Emphasis added.]

As thus phrased, the question assumes that when the Price Administrator promulgated MPR 30 on November 21, 1942, he resorted to the use of a specification or standard not previously used or required *because he had then decided* that there was no practicable alternative for securing effective price control. It is erroneously taken for granted in the Emergency Court's statement of the question that the type of determination which the Price Administrator was first placed under mandate to make by the enactment of Section 2(j)(3) of the Act on July 16, 1943, *was for all practical purposes made on November 21, 1942.*

But when the regulation was issued, the Price Administrator was under no mandate to determine, and actually he did not determine, that there was no practicable alternative to standardization for securing effective price control. Until the enactment of Section 2(j)(3), there was no occasion for the Administrator to make such a determination. There is nothing in the record to support the assumption that he did make such a determination on November 21, 1942. At that time the Administrator was authorized to issue a regulation, subject to the limitations expressed in Section 2(h) of the Act,[2] when in his judg-

[2] Section 2(h), prior to its amendment by the Stabilization Extension Act of 1944, read as follows: "2(h) The powers granted

ment its issuance was *necessary* to effectuate the purposes of the Act. Thus, when Maximum Price Regulation No. 30 was issued on November 21, 1942, the Administrator recited by way of preamble:

> In the judgment of the Price Administrator, it is *necessary* and proper to establish maximum prices for sales of wastepaper by a maximum price regulation. [Emphasis added.] (7 F.R. 9732)

The Price Administrator's judgment on November 21, 1942, that it was *necessary* to establish maximum prices for unsorted wastepaper in the manner then established by Maximum Price Regulation No. 30, does not supply the determination later made mandatory by the Taft amendment, that there is *no practicable alternative* to standardization for securing effective price control. On November 21, 1942, alternative methods of properly establishing maximum prices for unsorted wastepaper may have been available. The adoption of one or the other alternative was *necessary*. As long as either method was fair and reasonable, it did not matter which alternative was adopted; and upon the adoption of either one the Administrator could fairly have stated that in his judgment the establishment of maximum prices in the manner then set forth in the regulation was necessary, *regardless of whether another method of control offered a practicable alternative.*

By begging the real question, the court below has robbed the issue of its substance. We submit that the matter at stake is not thus to be carelessly brushed aside.

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in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

The Government Misstates the Question.

In the Government's brief, the question for decision is rather obviously distorted (Br.-p. 10):

> In this proceeding the question is whether Section 1347.14(d) of Maximum Price Regulation No. 30 must be declared to have been invalid between July 16, 1943, when Section 2(j) was added to the Act, and September 11, 1943, when the Price Administrator *publicly announced* his determination that there was no practicable alternative to the standardization embodied in the regulation for effective price control. [Emphasis added.]

The question here presented is *not* whether a *public announcement* of the determination required by Section 2(j)(3) is made a condition precedent to standardization. The precise question is whether Section 2(j)(3) does not make it a condition precedent to the validity of a standardization order that the required determination *be in fact made* prior to the issuance of the order. Petitioners do not complain of the failure to make a "publicly announced" determination. They simply say that *no statutory determination at all was made* prior to September 11, 1943; and that when the determination *was* made on September 11, 1943, it spoke only as of that date.

The Government obviously has strained to state the question for decision in such a form as to avoid the real issue, and this stratagem serves to befog its position with respect to the basic facts. It is not clear from the Government's brief whether its position is (1) that the Administrator *had in fact made* the required determination prior to September 11, 1943, or (2) that the Administrator *could have made* the required determination prior to that date but actually did not do so until September 11. Nor is it clear, with respect to these alternative contentions,

precisely when, prior to September 11, 1943, the determination (1) was made, or (2) could have been made.

Thus it is said, on the one hand, that on September 11, 1943, the Administrator "publicly announced his determination" (Br. p. 11)—the implication being that the determination had in fact been made some time prior to the public announcement. On the other hand, it is said that the statement by the Administrator on September 11, 1943 "shows plainly that his determination was based upon conditions which had existed in the industry for some time" (Br. p. 20)—the implication being that the actual determination was made on September 11, 1943.

We submit that there is no basis whatsoever in the record to support the proposition that the required determination was actually made prior to September 11, 1943. And it is of no consequence whether the determination, when actually made, was based upon conditions which had existed for some time. It is not the existence of conditions *permitting* the making of a determination which controls, but the actual *making* of the determination. Judge Lindley points out in his dissent (R. 49):

> From and after the effective date of the amendment, complainants, as well as others in the industry, had no foreknowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think, far beyond the intent of Congress; nor does it comport with my conception of due process of law.

A "Determination" Made in a Protest Proceeding Does Not Meet the Statutory Requirement.

The Government's position with respect to the *time* of the making of the Price Administrator's determination, is further confused by arguments concerning the sufficiency of findings made in administrative hearings pursuant to a protest. It seems to be the Government's position that it is immaterial whether the determination required by Section 2(j)(3) is made *after* the issuance of a standardization order, so long as a "final determination" is eventually made upon the disposition of a protest attacking the validity of the standardization order. This contention of the Government was made explicit in its memorandum in support of the motion to dismiss petitioners' complaint in the Emergency Court of Appeals. In its memorandum, the Government said (R. 15):

> In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged and it would be in such a proceeding that the Administrator, on the basis of the record, would make a *final determination* as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft Amendment. [Emphasis added.]

The same contention is advanced in the Government's brief here (p. 17), albeit in a rather attenuated form:

> Under the Emergency Price Control Act, which provides for administrative hearings after issuance of a regulation, pursuant to a protest, a finding such as has now been made to support the regulation is sufficient; for, as pointed out by the Emergency Court of Appeals, the purpose of the statutory protest proceeding to build a record for judicial review has been met. Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 515-516.

What the Government is saying, apparently, is that the determination actually made by the Administrator on September 11, 1943, was gratuitous—that even if he had not made it then, he was still in a position to make it upon the disposition of a protest filed under Section 203 (a), or in proceeding such as this one, under Section 204(e)(1). We submit that it is a gross distortion of the pattern of the Act to say that the requirement of an explicit determination under Section 2(j)(3) may be regarded, as the Administrator contends, "at most as a prerequisite to judicial determination of the validity of a standardization provision" (R. 15). The type of evidence which it is contemplated by the Act will be developed in a protest proceeding—the type of evidence which would give the Administrator an "opportunity to reconsider his action in the light of objections presented"—is clearly irrelevant and immaterial to the question whether the explicit determination required by Section 2(j)(3) has in fact been made prior to the issuance of a standardization order.

The Government's argument in this behalf would only have relevance if the *validity* of the Administrator's determination made on September 11, 1943, were the subject of inquiry in a protest proceeding. In such a case, the question presented would *not* be whether the Administrator *had in fact made* the required determination, but whether the determination was an arbitrary or unreasonable one. Upon judicial review, this Court might recognize that there was some conflict on the question whether there was a practicable alternative to effective price control, yet at the same time find that the Administrator's determination that there was no practicable alternative was not an arbitrary or unreasonable one. The record made in the protest proceeding would then be the basis of the judicial determination of the validity of the stan-

dardization provision. But certainly the notion cannot be sustained that in a proceeding such as the present one, the very purpose of which is to attack the validity of a standardization provision as of period *prior* to the making of the Administrator's determination, that the Administrator could lift himself by his boot straps and *presently* supply the requisite determination, at the same time giving it retroactive effect.

The Defense of "Invalidity" in a Criminal Case.

The basic unsoundness of the Government's contention that the Administrator can make his "final determination" of compliance with the Taft Amendment in a protest proceeding, is exposed upon closer analysis of the "exclusive jurisdiction" provision of the Act. Certainly a defendant in a criminal case—if he has timely pursued the remedies provided by the Act, for protesting the validity of a regulation—cannot be placed in a worse position respecting his substantive rights than he would be in the absence of the "exclusive jurisdiction" provision of the Act. Such a defendant, in the absence of the "exclusive jurisdiction" provision, could attack the regulation as invalid for want of the determination required by Section 2(j)(3). It would be shocking, indeed, for the Government, during the course of the criminal trial, to attempt to supply the administrative determination which had not been made in advance of the issuance of the regulation under attack. We submit that it is equally shocking to all concepts of due process to say that an *ex post facto* "final determination" in a protest proceeding can supply the basis for a conviction in a criminal case.

The Question of "Judicial Review."

Another aspect of the Government's contentions is presented by its reliance upon cases having to do with judicial

review of administrative findings. The Government would make it appear that the question here concerns the adequacy of findings in a record presented for judicial review, and cites a number of this Court's decisions approving the practice, upon judicial review of administrative orders, of remanding the proceedings to supply needed findings. No such question is presented here. Petitioners do not attack the finding or determination made by the Administrator on September 11, 1943. They do not ask this Court to inquire into the reasonableness or validity of the Administrator's finding or determination made on September 11, 1943. Neither the determination itself is attacked, nor its basis. On the contrary, petitioners concede for the purposes of this case that the determination made on September 11, 1943, was a valid one. This Court is not asked to judicially review the question whether the determination, when made, had an adequate basis in law. Consequently the cases cited in the Government's brief are not in point.

Petitioners simply say that no determination at all, such as is required by Section 2(j)(3), was made prior to September 11, 1943, and that the question whether conditions existed which would have permitted the Administrator to have made the determination before that date is entirely beside the point.

The position taken by the Government amounts in effect to saying that the Administrator may ignore the requirements of the Taft amendment until a protest is filed, and that then, for the first time, he can "declare" or "announce" his determination of compliance with the Taft amendment. Obviously, if no protest were ever filed we would have a situation where, under the Government's view, the Administrator would never be required to make the determination which Section 2(j)(3) expressly re-

quires. This would leave the Administrator in the position of being able to standardize a commodity at will, regardless of whether there was a practicable alternative thereto. The restrictions placed upon him by the Taft amendment would thereby lose all meaning, in that the Congressional intention to prevent disruption of industry practices by standardization, except as a last resort when no alternative to effective price control existed, would be completely nullified. *The statutory injunction to the Administrator to affirmatively make a determination before resorting to standardization would be transformed into a statutory permission to standardize any commodity until such time as a protestant is able to show that there is a practicable alternative to such standardization.* A construction of the Taft amendment which leads to this result cannot be sustained.

The extremes to which this view would carry have been emphasized in the dissenting opinion of Judge Lindley (R. 49):

> To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren *they could be convicted and sentenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation.* And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be vaild. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so. [Emphasis added.]

The Intent of the Congress.

The plain meaning of Section 2(j)(3), that the required determination must be made by the Administrator *before* he standardizes a commodity (see our main brief, pp. 20-22), the Government seeks to negate by reading into Senator Taft's statement on the floor of the Senate the notion that he considered the proposed amendment wholly innocuous (Br. pp. 12-13). That the amendment was not intended to interfere with *proper* and *unobjectionable* regulations then extant is perfectly clear. But it is equally clear that under the tests set up by the Taft amendment, Section 1347.14 (d) of Maximum Price Regulation No. 30 *was then objectionable* because it employed specifications or standards which had not theretofore been in general use in the trade, and had not been promulgated and required by another Government agency;—and in that respect it exceeded the limitations expressed in Section 2 (h) of the Act (see our main brief, p. 20). The provision in question remained objectionable—and by virtue of the enactment of Section 2(j)(3) became invalid—until September 11, 1943, when the objection was obviated and the provision validated by the Administrator's *affirmative determination* that there was no practicable alternative for securing effective price control. Moreover, the quotation from Senator Taft's statement would seem to have no bearing whatsoever upon the question here, since on its face it makes reference only to *grade labeling* and the *elimination of trade names*—which are not embraced within clause (3), but fall within the purview of clauses (1) and (2) of Section 2(j).

The Administrator argues that under our interpretation the Taft amendment would have seriously disrupted the price control structure. It is apparent, however, that the Congress was of the opinion that the Administrator himself had seriously disrupted the kind of price control struc-

ed originally to have been limited by section
Act. The Administrator's reliance upon "the
ion of continuity in price control" simply over
bviously basic intention of continuity of *lawful*
ol.

iderations which led to the statutory requir
express determination outweighed such con
as that a short time might elapse between the
the amendment and the Administrator's actio
e thereof, during which time a limited number
ons were open to attack. The situation is no
an that presented when the Administrator is
the issuance of a new regulation setting up
standards. There is necessarily involved a
me during which the Administrator must exam
e question of practicable alternatives to stand
During that time, and before he makes his
on, the issuance of the regulation is postponed

iatus" in Price Control of Unsorted Wastepaper.

ression is sought to be conveyed that the in
of Section 1347.14 (d) of M. P. R. 30 during the
16 to September 11, 1943, would have created
in price control of unsorted wastepaper. Actu
validation of the standardization provisions of
7.14 (d) would *not* have created any such hiatus.
nce of Section 1347.14 (d), every lot of unsorted
would have to be priced *upon the basis of its*
ents—that is, according to the maximum prices
by M. P. R. 30 *for each grade* in the lot, depend
he amount of each such grade. Section 1347.14
a penalty price upon unsorted wastepaper.
of the grades and amount of each grade con
ny one lot. The invalidation of Section 1347.14

(d) during the period July 16 to September 14, 1943, would only have *eliminated the penalty—it would not have eliminated price control.*

Clauses (3) and (4) of Section 2(j) Construed Together.

The construction here contended for by petitioners follows inescapably from the construction placed upon section 2(j) of the Act by the court below in its decision in No. 67. There the court sustained the Administrator's contention that "there is a third situation in which Section 2(j) authorizes him to make use of specifications or standards for the purpose of fixing maximum prices. * * * clauses (3) and (4) of Section 2(j) are to be read together as providing three alternative situations in any one of which he is authorized to employ specifications or standards in connection with price control." [See opinion of court in Transcript of Record in No. 67, pp. 61-65.] We submit that if clauses 3 and 4 are to be read together, and their arrangement in the disjunctive ignored, then the phrase "prior to such order" which appears in clause 4 must be linked, as a matter of logic, to the clause "unless the Administrator shall determine" which appears in clause 3. That is to say, a logical reading of clauses 3 and 4—taken together to express the three situations in which the Administrator may use specifications or standards—would be as follows:

> "Nothing in this Act shall be construed * * * as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, *prior to such order* (1) in general use in the trade or industry affected, or (2) promulgated and their use lawfully required by another Government agency, or (3) determined by the Administrator to be essential because no practicable alternative exists for securing effective price control with respect to such commodity."

The Administrator's express determination that there is no practicable alternative is a made condition, on a par with the other two conditions, under which standardization becomes permissible. Whicheyer of the three conditions is met, it must be capable of objective ascertainment. It is obviously capable of ascertainment whether the standards or specifications have been in general use in the trade or industry affected. It is likewise ascertainable whether they have been promulgated and their use lawfully required by another Government agency. It must by the same token be ascertainable, when neither of the first two conditions is met, that the Administrator *has in fact determined* that no practicable alternative exists, and that such actual determination was made *prior to the issuance of the standardization order.* To say that the Administrator's determination that there is no practicable alternative need not be officially expressed of record prior to the effectiveness of a standardization order, is to destroy the logic of the construction under which clauses 3 and 4 are read together.

Conclusion.

It is respectfully submitted that the judgment of the court below should be reversed and that Section 1347.14(d) of Maximum Price Regulation No. 30 should be adjudged invalid from the date of the enactment of the Taft amendment, July 16, 1943, until the date of the making of the Administrator's determination, September 11, 1943.

Respectfully submitted,

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